Supreme Court, U. S.
FILED
MAY 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-1347

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1547, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner is the exclusive representative of the employees of the M & M Electric Company, a Fairbanks, Alaska, electrical contractor. Under the collective bargaining agreement between the company and the union, the union operates a hiring hall from which employees are assigned to fill the company's needs on a routine basis (Pet. App. 14, 16).

In late August 1975, the company put in a call to the hiring hall for five employees to work straight 40-hour weeks for four weeks. Because there was other work available in the area at that time for which there were assurances of substantial overtime, a number of senior union members declined to accept the work with M & M.

As a result, the work was assigned to five of the less senior members, all of whom reported for work the next day (Pet. App. 35-36, 49-50).

At the end of the work day, one of the company's prime contractors informed company officials that it wanted some service work done immediately on another project. The company foreman assigned this emergency work to the handful of employees who were still present, including three of those who had been assigned from the hiring hall the previous day (Pet. App. 16-17).[1] Shortly after the employees arrived at the other project and began working, union business agent Daniel McLean entered the building along with a number of other union members. Charging that the men on that project had improperly been given overtime work, they disrupted the work, threatened and assaulted the employees, confiscated their dues receipts, forced them out of the building, and confiscated their trucks, forcing them to walk back to town (Pet. App. 17-21, 43-44). While the evicted employees were making their way back to town, McLean drove his truck off the pavement toward them, and they were forced to dive into a roadside ditch to avoid being hit (Pet. App. 21-22). The employees were later stopped and again accosted by McLean and his men (Pet. App. 22, 43-45).

[1]Petitioner suggests (Pet. 4 and n. 2) that the emergency assignment was arranged in an effort to circumvent the hiring hall provisions of the collective bargaining agreement, noting that several of the men were friends who had come to Alaska from Indiana, and that they were friends of a company foreman. A much simpler and less sinister explanation for the fact that the group of friends were still at the company office at the end of the day, when the new work was announced, was that they were preparing to celebrate the birthday of one of their members. The Administrative Law Judge credited this explanation rather than the union's (Pet. App. 17).

As the employees completed the service work the next afternoon, they were again approached by McLean and his men. The police intervened, preventing violence (Pet. App. 37, 44-45). Two days later, because of pressure by the union, the company discharged the five employees and the foreman who had been doing the service work (Pet. App. 37-38, 51-55).

2. Two of the discharged employees filed charges with the National Labor Relations Board, and a hearing was held on the charges. The Administrative Law Judge subsequently issued a comprehensive opinion, finding that petitioner had violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. 158(b)(1)(A), 158(b)(2), by threatening and assaulting the employees and by causing them to be discharged (Pet. App. 13-67). He rejected petitioner's defense that the hiring hall call was fraudulent and that the emergency service work assignment was in violation of the terms of the collective bargaining agreement (Pet. App. 50-51). The Board adopted the Administrative Law Judge's decision (Pet. App. 11-12), and the court of appeals affirmed (Pet. App. 10).

3. Petitioner's sole contention is that the decision in this case is in conflict with *National Labor Relations Board* v. *Furriers Joint Council*, 224 F. 2d 78 (C.A. 2). In that case, the court of appeals held that the union did not violate the National Labor Relations Act when its agents attacked employees who were performing work in violation of the collective bargaining agreement. Since the employees were acting in violation of the contract, the court held, their conduct was not protected by the Act and the assaults on them, however unlawful under state or other federal laws, were not in violation of the National Labor Relations Act.

In this case, by contrast, the Administrative Law Judge specifically found that the employees were attacked and subsequently discharged for performing work that was assigned in accordance with the collective bargaining agreement (Pet. App. 50-51). Accordingly, even under the *Furriers* decision, petitioner's conduct would have been unlawful.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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MAY 1978.

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[2]The Board has not accepted the Second Circuit's decision in *Furriers*, as the Administrative Law Judge noted (Pet. App. 56-57). The Board's view is that violent conduct of the kind engaged in here is unlawful whether or not the victims are technically in violation of the terms of the collective bargaining agreement. *Teamsters Local 729 (Penntruck Co., Inc.)*, 189 N.L.R.B. 696; *Brewers Local 6 (Custom Packaging Corp.)*, 192 N.L.R.B. 1263. Yet while the Administrative Law Judge acknowledged that he was bound by the Board's precedents, he pointed out that even under the Second Circuit's view of the law, the union would be liable in this case, since "there has been no showing that the discriminatees [violated] the overtime provisions of [petitioner's] collective-bargaining agreement" (Pet. App. 57).